cause of section 10(b), the decisions of operators not to carry this material on leased access channels may be laid at the feet of the government. *Blum*, 457 U.S. at 1004; *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 547 n.29. And it is a burden they have not sustained.

Petitioners' third way of establishing state action relies on section 10(d) of the 1992 Act, the provision removing the civil and criminal immunity of cable operators for obscene programming carried on their access channels.[15] Section 10(d), they say, provides—in the words of *Blum*, 457 U.S. at 1004—"such significant encouragement" to operators to bar indecent programming on access channels that their "choice must in law be deemed to be that of the" government. *Blum* itself rejected a similar argument. Although state regulations penalized nursing homes for failing to "discharge or transfer patients whose continued stay [was] inappropriate," the regulations did not themselves dictate the decision to discharge or transfer. *Id.* at 1009. Therefore, "penalties imposed for violating the regulations add[ed] nothing to [the patients'] claim of state action." *Id.* at 1010. The same logic applies here. Because obscenity is not constitutionally protected, Congress may prohibit its showing on access channels. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. at 124. Nothing in section 10(a), section 10(b), or section 10(c) compels cable operators to refuse to carry indecent programming. The matter is left to their editorial discretion. With discretion comes responsibility. Section 10(d) thus imposes on cable operators the same liability for obscene access programming that operators long have had with respect to other programming on channels they control. 47 U.S.C. § 558 (amended 1992). Under the 1992 Act, whenever an operator chooses to carry indecent programming on any

[15] Petitioners contend that section 10(d) is "particularly suspect" because it covers programming that merely "*involves* obscene material." Brief for Petitioners at 31 n.15 (italics added); *see supra* note 1. As petitioners acknowledge, however, the Commission's unchallenged interpretation of the statutory phrase is that operators lose immunity only for material that "is unprotected by the

channel, it does so against the backdrop of Congress's prohibition against obscenity on cable television. That a cable operator takes this into account in deciding which programs to carry—on any channel—does not convert its refusal to carry indecent programming into state action. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989); *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 n.6 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988).[16]

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first amendment." First Report and Order, 8 F.C.C.R. at 1005 ¶ 44 n.40.

[16] Three other courts of appeals have found no state action in comparable contexts. *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992); *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991); *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352 (11th Cir. 1986). Acting pursuant to a federal statute, telephone companies furnishing billing services to dial-a-porn purveyors blocked their indecent messages until customers, in writing, specifically requested access. The purveyors challenged the statute as a prior restraint in violation of the First Amendment because it required them to classify their messages based on content. The Second and Ninth Circuits found no state action. *Dial Info. Servs. Corp.*, 938 F.2d at 1539, 1543; *Information Providers' Coalition*, 928 F.2d at 871, 877. Both courts of appeals ruled that because the government did not compel telephone companies to supply billing services to dial-a-porn purveyors—which is what triggered the statute's blocking and classification requirements—the telephone companies were not state actors and the First Amendment did not apply. *Dial Info. Servs. Corp.*, 938 F.2d at 1535; *Information Providers' Coalition*, 928 F.2d at 877. In *Carlin Communication, Inc.*, the Eleventh Circuit held there was no state action in a telephone company's decision not to offer sellers of sexually explicit messages access to its prerecorded message service, even though a state regulatory agency studied the company's proposed policy, issued an order "strongly approving" the policy, and authorized a tariff amendment incorporating it. *Carlin Communication, Inc.*, 802 F.2d at 1358, 1359.

These decisions cannot be distinguished on the ground that with respect to cable television, operators must accept non-indecent access programming. What matters—in the dial-a-porn cases and in this one—is whether the government has so injected itself into

B

Petitioners think that by calling leased access and PEG channels "public forums" they may avoid the state action problem and invoke the line of First Amendment decisions restricting governmental control of speakers because of the location of their speech. But a "public forum," or even a "nonpublic forum," in First Amendment parlance is government property. It is not, for instance, a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee. The Supreme Court uses the "public forum" designation, or lack thereof, to judge "restrictions that the government seeks to place on the use of *its* property." *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992) (italics added). State action is present because the property is the government's and the government is doing the restricting. In this line of cases, regulation of speech on government property traditionally used for public expression—streets and parks, for instance—gets the highest level of scrutiny. *Id.*; *Christian Knights of the Ku Klux Klan v. District of Columbia*, 972 F.2d 365, 372 (D.C. Cir. 1992). These are the typical "public forums." Regulation of government property opened for expressive activity, although not traditionally so used, gets the same First Amendment treatment. *International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2705. "Nonpublic" forums—nonpublic, that is, in the respect that the government has not opened its property to the public—are treated less stringently. *Id.* All of the Supreme Court's "public forum" cases fall into one of these three categories.[17] Access

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the private actor's decision triggering federal regulation that the decision may, for purposes of constitutional analysis, be treated as the government's.

[17] *See, e.g., International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. at 2703 (airports owned by Port Authority of New York and New Jersey); *United States v. Kokinda*, 497 U.S. 720, 723 (1990) (sidewalk belonging to post office); *Cornelius v. NAACP*

channels fall into none of them. As petitioners and everyone else knows, these channels are not government owned. The channels belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers.

Petitioners nevertheless insist that even private property may sometimes be considered a "public forum" for First Amendment analysis. For this proposition they rest upon the italicized portion of the following statement in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985): "[a]lthough petitioner is correct that as an initial matter a speaker must seek access to public property or to *private property dedicated to public use* to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue." The forum in *Cornelius* was the Combined Federal Campaign, created

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Legal Defense & Educ. Fund, 473 U.S. 788, 792 (1985) (fundraising campaign for federal employees established pursuant to executive order); *United States v. Grace*, 461 U.S. 171 (1983) (sidewalk in front of Supreme Court building); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39 (1982) (school district's internal mail system); *Greer v. Spock*, 424 U.S. 828, 830 (1976) (United States Army post); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299 (1974) (advertising space on public rapid transit vehicles); *Adderley v. Florida*, 385 U.S. 39, 40 (1966) (premises of county jail). In *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 128, 131 (1981), which petitioners do not cite, the Court held that privately owned mailboxes are not "public forums" and sustained a federal law prohibiting anyone from placing unstamped mailable matter in them. In finding no "public forum," it is uncertain whether the Court meant that mailboxes are simply private property, as Justice Stevens thought in dissent, 453 U.S. at 152, or, however described, are not open to the public for the expression of ideas.

A list of Supreme Court opinions using the phrase "public forum" through the October 1983 Term is contained in Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Form Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221 n.15 (1984).

and regulated by the government, and consisting of "an annual charitable fundraising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees." 473 U.S. at 790, 801. The forum was not, in other words, what the Court described as "private property dedicated to public use." While the Court cited no examples of such private property, it may have been referring to the government function cases of *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976), *overruling Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968); and *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568–69 (1972), in which a similar formulation—the "doctrine of dedication of private property to public use"—made its Supreme Court debut. What makes the *Cornelius* dictum puzzling is that neither *Hudgens* nor *Lloyd* embraced any such doctrine. Far from it. In holding that private shopping centers may not be equated with public streets and parks for First Amendment purposes, *Hudgens* and *Lloyd* found the dedication-of-private-property-to-public-use notion "attenuated," "by no means" constitutionally required, and untenable.[18] *Hudgens*, 424 U.S. at 519; *Lloyd Corp. v. Tanner*, 407 U.S. at 569; *cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80–81 (1980).

Given the holdings of *Hudgens* and *Lloyd*, the dictum in *Cornelius* cannot serve as a basis for resurrecting this rejected doctrine. And it cannot support a determination that cable access channels are so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system. In saying this,

[18] *Hudgens* and *Lloyd* distinguished the company town case of *Marsh v. Alabama*, 326 U.S. 501 (1946), on the grounds that the private owner of the town assumed "all of the attributes of a state-created municipality," exercised "semi-official municipal functions as a delegate of the State," and performed "the full spectrum of municipal powers," *Hudgens*, 424 U.S. at 519 (quoting *Lloyd*, 407 U.S. at 569). None of the parties to this case even cite *Marsh*. The decision has no bearing on the issue before us for quite obvious reasons. Cable operators do not exercise municipal functions, let alone the "full spectrum" of municipal powers.

we recognize that unlike our examples of supermarket bulletin boards and private computer networks, the government—in the 1984 Act—compelled cable operators to provide leased access and, if the franchising authorities so demand, PEG access channels. This had the effect, as the Commission found in its First Report and Order in this case, 8 F.C.C.R. at 1001–02 ¶ 22, and as the Supreme Court had anticipated in *Midwest Video*, 440 U.S. at 701, of imposing "common-carrier obligations on cable operators." In the communications context, however, the fact that a regulated entity is a common carrier—that under certain circumstances it must provide communications facilities to those who desire access for their own purposes (440 U.S. at 701)—does not render the entity's facilities "public forums" in the First Amendment sense and does not transform the entity's discretionary carriage decisions into decisions of the government. *See Information Providers Coalition v. FCC*, 928 F.2d at 877; *Carlin Communications*, 827 F.2d at 1297; *see also Sable Communications of California, Inc. v. FCC*, 492 U.S. at 133 (Scalia, J., concurring). A heavily regulated private carrier of electricity may cut off service without having its decision scrutinized as if it were a state decision, *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 358–59, and a private cable operator may refuse to carry indecent programming without having its decision tested by First Amendment principles applicable to the government alone.

* * *

Because we find no state action here and because that essential element cannot be supplied by treating access channels as public forums, we do not reach petitioners' First Amendment attack on sections 10(a) and 10(c).

III

We turn now to section 10(b) of the 1992 Act. The provision applies to cable operators who decide to carry indecent programming on leased access channels. As implemented by the Commission's regulations, section 10(b) directs these operators to segregate leased access programming

"identified by program providers as indecent" on a particular leased channel (or channels, if more than one is needed) "available to subscribers only with their prior written consent. . . ." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(b)). Upon receipt of a subscriber's "written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old," the operator must make the programming available within thirty days. *Id.* Petitioners detect four constitutional infirmities in this scheme: (1) section 10(b) is not the least restrictive means of achieving the government's interest; (2) it impermissibly discriminates against indecent programming on leased access channels; (3) it constitutes an invalid prior restraint; and (4) it is unconstitutionally vague.

"All questions of government are ultimately questions of ends and means." *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 290 (D.C. Cir. 1993). So here. The end of section 10(b) is not in doubt—it is to "limit the access of children to indecent programming." Pub. L. No. 102–385, § 10(b), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 532(j)(1)). That the government has a "compelling interest in protecting the physical and psychological well-being of minors," which "extends to shielding minors from the influence of literature that is not obscene by adult standards," is beyond dispute. *Sable*, 492 U.S. at 126. Since the First Amendment permits the government to achieve that aim so long as it uses the least restrictive means, *id.* at 126, the first question section 10(b) raises is whether its segregation and blocking requirements are such means.

In deciding this issue, it is essential to begin by comparing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), with *Sable*. In *Pacifica*, the Commission ruled that an afternoon radio broadcast containing offensive, sexually explicit language violated a federal prohibition against indecent radio communications. *Pacifica*, 438 U.S. at 731–33. Underscoring the nature of radio broadcasting—its "uniquely pervasive presence" making protection of unwilling listeners by broadcasting prior

warnings impossible, *id.* at 748, and its accessibility to children, *id.* at 749–50—the Court held that the Commission could prohibit a radio program containing indecent words during times when there was a reasonable risk children would be in the audience, *id.* at 732, 750. Eleven years later, in its next encounter with federal regulation of media indecency, the Court struck down legislation totally banning indecent interstate commercial telephone messages. *Sable*, 492 U.S. at 117. *Sable* distinguished *Pacifica* on the bases that children do not have the same access to commercial telephone communications as they do to radio broadcasting, and that indecent telephone communications do not present the problem of surprising unwilling listeners. *Id.* at 127–28. The *Sable* Court found that the total ban on indecent commercial telephone communications limited "the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131.[19] Given these considerations, the Court ruled there were less restrictive ways, short of a total ban, to accomplish the government's goal of protecting children from indecency. *Id.*

From *Pacifica* and *Sable*, we distill two principles applicable to this case. First, the constitutionality of indecency regulation in a given medium turns, in part, on the medium's characteristics. Second, in fashioning such regulation, the government must strive to accommodate at least two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in having access to such material. As to the first, it is apparent that leased access programming has far more in common with the radio broadcast in *Pacifica* than with the telephone communication in *Sable*. Nearly fifty-six million households, more than sixty percent of all households with televisions, subscribe to cable service. H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 56 (1992). Most cable subscribers do not or cannot use antennas to receive broadcast television services. *Id.* at 57. Hence "[c]able television has become our Nation's dominant video

[19] That finding necessarily entails the proposition that there are conversations unsuitable for children to hear.

distribution medium." S. REP. No. 92, 102d Cong., 1st Sess. 3 (1991). The cable audience, like the radio broadcast audience, "constantly tun[es] in and out," so that prior warnings will not "completely protect the . . . viewer from unexpected program content." *Id.* Unlike services that subscribers affirmatively choose and pay for, such as dial-a-porn or cable pay-per-view and premium channels, leased access channels automatically come into all cable subscribers' homes. Indecent leased access programming thus hardly qualifies as an "invited guest," *see* Judge Wald, dissenting, at 21. A cable subscriber no more asks for such programming than did the offended listener in *Pacifica* who turned on his radio. Cable television now provides a vast amount of information in an easily accessible way. In this respect, it is similar to broadcasting. Consequently, it makes no sense to say that the First Amendment requires a household either to forego cable television altogether or risk exposure to indecency. For purposes of regulating indecency on those channels, we conclude that cable television is sufficiently pervasive and easily accessible to children to justify the government's attempts to regulate indecency on cable channels.

In light of the nature of leased access programming, does section 10(b) represent the least restrictive means of furthering the government's goal of protecting children from indecent programming? Petitioners say no, Congress could have accomplished what segregation and blocking achieve either by continuing to rely entirely on the 1984 Act's provision giving cable viewers the option of voluntarily blocking indecent programming, 47 U.S.C. § 544(d)(2)(A), or by confining indecent programming to late at night—a "safe harbor." We agree with the government that, given the pervasiveness of cable television and its accessibility to children, neither of these options would have achieved the government's aims. As to subscriber-initiated blocking, the Commission concluded that the type of programming with which section 10(b) is concerned presents special problems such a system does not solve. Leased access programming "may come from a wide variety of independent sources, with no single editor controlling [its] selection and presentation," placing a cable viewer in

risk of being intermittently and randomly confronted with patently offensive displays of sexual or excretory activities or organs. First Report and Order, 8 F.C.C.R. 998, 1000 ¶ 15 (1993). To prevent exposing children to such programming under a voluntary blocking system, cable viewers would have two, equally unacceptable options. Either they could continually activate and deactivate their lockboxes, inevitably risking a slip up or a lapse that would expose their children to indecency, or they could install lockboxes permanently, thereby giving up leased access programming altogether. *Id.* at 1000–01 ¶ 15; *cf. Dial Info. Servs.*, 938 F.2d at 1542 ("voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn as . . . would [a] presubscription requirement"). Nor would a "safe harbor" period protect children from indecent programming as effectively as section 10(b)'s segregation and blocking requirements. Even during late hours, some unsupervised children will be watching cable television and thereby have access to indecent programming, a risk that section 10(b) eliminates. Not only do section 10(b)'s segregation and blocking requirements most effectively further the compelling interest in protecting children from indecent leased access programming, but also this provision minimally burdens those adults who wish to watch such material. In this respect, section 10(b) differs markedly from the regulations considered in *Pacifica* and *Sable*. In *Pacifica*, an adult could not tune into indecent broadcasting at times when "there [was] a reasonable risk that children [might] be in the audience," 438 U.S. at 732; and in *Sable*, an adult could never dial into indecent commercial telephone messages, 492 U.S. at 131. By contrast, section 10(b) provides that those adults desiring to watch indecent programs on the channel the operator has set aside can do so no later than thirty days from the date of their request. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(c)). In fact, segregation and blocking appear to accommodate the interests of those viewers who want indecent programming *better* than would a safe harbor system, under which cable viewers

would be confined to watching such programming during designated, often inconvenient time periods.

Given its effectiveness in limiting the exposure of children to indecent programming and its insignificant restriction of adults' access to such material, we conclude that section 10(b) passes the least restrictive means test.

Petitioners' second argument is that the segregation-and-blocking system unconstitutionally discriminates against programming on leased access channels. Section 10(b), according to petitioners, embodies "speaker-based discrimination" in violation of the First Amendment and the equal protection component of the Fifth Amendment because similar regulations do not apply to other types of channels. We find this idea tenuous. Section 10(b) no more singles out indecent leased access programming for regulation than did the 1984 Act, which petitioners tout as the epitome of constitutionality. *See infra* p. 14. They ignore entirely that a blocking system has been in place for all channels, and thus with respect to all "speakers" on cable television, since 1984. As we have mentioned, the 1984 Act, in "order to restrict the viewing of programming which is obscene or indecent," required cable operators to sell or lease requesting subscribers "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d)(2)(A). These devices, commonly known as lockboxes or "parental control devices," use a key or a numeric code to lock out certain channels. DANIEL L. BRENNER, ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.09[3][c], at 6–98 (1994). Employing the devices, subscribers can "decide whether to block a channel and have the operator keep that channel out of their home by the flick of a switch." *Id.* Section 10(b) of the 1992 Act altered this system so that blocking on leased access channels carrying indecent programming is now operator-initiated, with subscribers retaining the option of having the channel unblocked.[20]

[20] Section 10(b)'s regulatory scheme parallels the one Congress imposed on the dial-a-porn industry. Under 47 U.S.C. § 223(c)(1), telephone subscribers can obtain access to obscene or indecent

From the perspective of those petitioners who show or wish to show indecent programs on these channels, the difference between the two systems amounts to this: under the 1984 Act, their material got into the home unless the subscriber locked it out; under the 1992 Act, their material does not get into the home unless the subscriber invites it in. Either way the programmers' products are available to those who want to watch them. Of course, there will always be subscribers disinclined to any action regardless of what system is in place. Before 1984, their television sets would receive the indecent programs shown on these channels; after 1992, they would not. But we see no reason why leased access programmers should necessarily retain the advantage of such inertia, and we can conceive of no constitutional principle entitling them to do so. Furthermore, there is little difference between section 10's treatment of indecent leased access programming and the 1992 Act's handling of pay-per-view programming. Under current regulations, pay-per-view programs are, in effect, blocked and segregated: as the "negative option billing" provision requires, a subscriber will not receive such programs unless he or she specifically so requests. 47 U.S.C. § 543(f) ("A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name.").[21] If that is constitutional, and it surely is, so is section 10(b).

We reach the same conclusion when we consider the matter from the perspective of those petitioners who are cable

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telephone messages only by making a written request to their telephone carriers. The Second and Ninth Circuits have rejected constitutional challenges to this statute. *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992); *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991); *see supra* note 16.

[21] If the operator decides to offer a "premium channel" free of charge—that is a "pay service offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC–17, or R" the operator must give at least 30 days notice of the offering and block the channel at the subscriber's request. 47 U.S.C. § 544(d)(3).

subscribers. For the purpose of this analysis, subscribers may be divided into two classes—those who do, and those who do not, want to receive indecent programming on leased access channels. Before the 1992 Act, viewers in the do-not-want category always had to take the initiative and to bear the expense of blocking indecent programming from their homes. It was up to them to request their cable operators to provide lockboxes to them, and they paid for the equipment. With the 1992 Act, it is the do-want class who must take the initiative: they are now the ones who have to make a request, in writing, for access to indecent programming.[22] Under both systems, adults who wish to receive this type of material receive it. Certainly, as to the 1984 Act's lockbox system, there can be no constitutional objection. If individuals do not want indecent material coming into their homes, they have every right to keep it out. Nothing in the Constitution gives cable operators and programmers the right to demand that subscribers watch whatever they produce. The corollary to the freedom to bring expressive material into the home is the freedom not to bring it in. By requiring lockboxes to be made available upon request, the 1984 Congress facilitated the freedom of viewers and thereby advanced First Amendment values. It cannot make a constitutional difference that the 1992 Congress, through section 10(b), has also facilitated viewer preferences by shifting the burden of making a request from the do-not-want class to the do-want class of subscribers.[23]

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[22] Viewers preferring "unimpeded, selective access to some but not all" indecent programming, *see* Judge Wald, dissenting, at 14, still have the option of requesting access to a blocked channel and installing a lockbox that enables them to block indecent programming they do not want their children to see. Judge Wald apparently agrees that lockboxes are effective means of restricting access to indecent programming. *See id.* at 23–25.

[23] Petitioners do not contend that any stigma attaches to a subscriber requesting unblocking or that subscribers would otherwise be deterred from making a request. Playboy's pay-per-view channel, to which subscribers must also request access, apparently has a large audience. *See* Comments of New York Citizens Com-

To say, as petitioners do, that section 10(b) distinguishes between indecent speech and other types of speech, or that it singles out leased access channels from other cable channels, supplies only a description, not an analysis. Of course section 10(b) does what petitioners say, but it does so for a particular, and for a constitutionally permissible reason--to protect children and to enhance the ability of parents to shield their children from the influence of "adult" programming. *See Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968). The notion that Congress could not take one step in this direction without imposing section 10(b)-like requirements on all cable channels is not only untenable (*see United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2707 (1993)), but also inconsistent with the least restrictive means test we have just discussed. That constitutional principle confines the scope of the solution to the extent of the problem. *See Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 511–12 (1991). To repeat what we wrote earlier, leased access programming comes from a wide variety of sources;

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mittee for Responsible Media, at 11 (Dec. 29, 1992). Moreover, the 1984 Act and the 1992 Act contain provisions protecting the privacy of subscribers in their dealings with cable operators. Pub. L. No. 102–385, § 20, 106 Stat. 1460, 1497–98 (1992) (codified at 47 U.S.C. §§ 551(a)(2), 551(c)(2)); Pub. L. No. 98–549, § 631, 98 Stat. 2779, 2794–95 (1984) (codified at 47 U.S.C. § 551). Although the parties do not mention the case, it is worth noting that for these reasons *Lamont v. Postmaster General*, 381 U.S. 301 (1965), is distinguishable. The Supreme Court there struck down a statute directing the Post Office to detain mail containing "communist political propaganda" and to deliver it only upon the addressee's affirmative request. *Id.* at 302, 307. The law set federal officials "astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail," *id.* at 306, and the Court rested its decision on the "narrow ground" that this would deter persons from requesting such mail because they "might think they would invite disaster if they read what the Federal Government says contains the seeds of treason," *id.* at 307. It is not the federal government, but private cable operators, who receive the unblocking requests, and federal law forbids the operators from revealing what choice any particular subscriber has made.

no single entity controls its selection and presentation; no single editor is responsible for what is shown. What will appear on these channels, and when, is anyone's guess. Without segregation and blocking, cable viewers risk subjecting themselves and their children to sporadic encounters with patently offensive displays of sexual or excretory activities or organs. First Report and Order, 8 F.C.C.R. 998, 1000 ¶ 15 (1993). Only PEG access channels are comparable. But they did not pose dangers on the order of magnitude of those identified on leased access channels, and Congress knew that if this situation changed, local franchising authorities could respond by issuing "rules and procedures" or other "requirements" pursuant to the 1984 Act, 47 U.S.C. § 531(a) & (b), or by eliminating PEG access channels altogether, 47 U.S.C. § 531(a). If Congress nevertheless had stretched section 10(b) to cover other cable channels, if it had not concentrated only on leased access channels, it could have been charged with having regulated more extensively than necessary. While there undoubtedly is indecent programming on other cable channels,[24] the Commission found that cable operators

[24] Operators have the power to impose a segregation and blocking system on the vast majority of their non-access channels, because their editorial control over such channels is unfettered by federal regulation. The only exception is for those channels they must set aside for local broadcasting to fulfill their "must-carry obligations." *See generally* 47 U.S.C. §§ 534, 535; *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994). Broadcasting, however, is regulated under a separate statutory scheme limiting indecent programming to the late evening hours. *See generally Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993), *reh'g in banc granted*, 15 F.3d 186 (D.C. Cir. 1994). As to PEG access channels, section 10(c) of the 1992 Act gives cable operators "broad discretion" to decide how to treat indecent programming carried there, and may if they choose impose a blocking system. Second Report and Order, 8 F.C.C.R. 2638, 2641 ¶ 19. According to the Commission, Brief for the Commission at 45, operators are not prohibited from imposing a segregation and blocking system for PEG channels. *See* First Report and Order, 8 F.C.C.R. at 1005 ¶ 43 n.39. Thus, under section 10(b) operators are *required* to segregate and block indecent programming carried on leased access

generally provide it through "per-program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b)." First Report and Order, 8 F.C.C.R. at 1001 ¶ 19 n.20. Indeed, petitioners' examples of indecency on other nonleased access channels—the Playboy Channel and "Real Sex" on HBO—fall into this category. In short, there is no constitutional rule forbidding Congress from addressing only the most severe aspects of this problem, and there are constitutional doctrines, such as narrow tailoring and least restrictive means, that may have constrained it from going further than necessary.

Petitioners' two remaining contentions regarding section 10(b) merit only brief discussion. That the Commission's regulations give a cable operator up to thirty days to comply with a subscriber's request to unblock a leased access channel does not entail a "prior restraint" in violation of the First Amendment.[25] *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(c)). A prior restraint is an administrative or judicial order restraining future speech. *See, e.g., Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993); *American Library Ass'n v. Barr*, 956 F.2d 1178, 1190 (D.C. Cir. 1992). Yet nothing in section 10(b) forbids speakers from speaking. *Compare Vance v. Universal Amusement Co.*, 445 U.S. 308,

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channels, while they are generally *permitted* to do so on other channels.

[25] Petitioners also contend that § 10 as a whole constitutes a prior restraint because cable operators are "pressured to censor" indecent programming according to a regulatory scheme that "dictates the contours of this censorship." Although framed in different terms, this argument is essentially identical to petitioners' claim regarding state action, which we discussed and rejected. *See supra* pp. 10–27. We reiterate that cable operators who decide to prohibit indecent programming on access channels are not state actors. Consequently, their banning of such material cannot constitute a prior restraint. *Cf. Dial Info. Servs.*, 938 F.2d at 1543; *Information Providers' Coalition*, 928 F.2d at 877.

311 (1980); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975). The offerings of leased access programmers will air. Subscribers wishing to see indecent speech may not have their wishes fulfilled instantaneously,[26] just as new subscribers to cable television may have to wait for their services to be hooked up. The latter is not a prior restraint, and neither is the former. *See Dial Info. Servs. Corp.*, 938 F.2d at 1543; *Information Providers' Coalition*, 928 F.2d at 878. The government is neither prohibiting indecent programming in advance, nor requiring anyone to obtain the government's stamp of approval before a program airs.

Petitioners' remaining argument is that section 10(b) is impermissibly vague because leased access programmers must identify for cable operators which of their programs are indecent. Programmers thus must "worry about what a cable operator may 'reasonably believe' to be indecent." Brief for Petitioners at 46. The Commission's definition of indecent programming essentially tracks the definition of broadcast indecency this court reviewed in *Action for Children's Television v. FCC*, 932 F.2d 1504, 1507–08 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992) (*ACT II*). *Compare Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(g)). In *ACT II*, 932 F.2d at 1507–08, and in *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338–39 (D.C. Cir 1988) (*ACT I*), we held that the Supreme Court's *Pacifica* decision foreclosed the question whether this definition of indecency was unconstitutionally vague: "if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction." *ACT I*, 852 F.2d at 1339. No intervening Supreme Court decision affects our determination. There is nothing to petitioners' lament that

[26] The FCC determined that a written request, rather than a telephonic one, was necessary to enable a cable operator to ascertain that the requestor is over eighteen years old. First Report and Order, 8 F.C.C.R. at 1009 ¶ 67.

access programmers will have trouble discerning what cable operators consider indecent. Since the Commission will resolve any conflicts between a programmer and an operator on this issue, First Report and Order, 8 F.C.C.R. at 1010 ¶ 75, programmers must ultimately concern themselves with potential *Commission* determinations regarding indecency. In this respect, they are in precisely the same situation as the petitioners in *ACT I* and *ACT II*.

* * *

Section 10(b)'s segregation and blocking requirements satisfy the least restrictive means test; do not impermissibly single out leased access programming for regulation; do not constitute a prior restraint on speech; and are not, because of the definition of indecency, unconstitutionally vague.

The petitions for review are denied.

WALD, *Circuit Judge*, with whom TATEL, *Circuit Judge*, and, with respect to Parts I and III, ROGERS, *Circuit Judge*, join, dissenting: Lurid descriptions of programming that may well cross over the line into obscenity and merit no First Amendment protection at all should not obscure what this case really is about. *See* Majority opinion ("Maj. op.") at 19–20. This case is *not* about obscenity; it concerns significant restrictions on a class of speech that is unquestionably entitled to constitutional protection, although possibly offensive to some audiences. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Under the broad definition of "indecency" used in this regulation, affected speech could include programs on the AIDS epidemic, abortion, childbirth, or practically any aspect of human sexuality.[1]

The Denver Area Educational Television Consortium's critically-acclaimed program The 90's Channel, transmitted on the leased access channels of eight cable systems, serving 500,000 customers, provides information and opinion on a broad range of subjects in a self-described "unvarnished"

[1] The regulations define "indecent" programming as programming "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993). The definition thus extends to any programming that includes "patently offensive" verbal descriptions or visual depictions of sexual or excretory activities, regardless of the literary, artistic, political, or scientific merit of the work as a whole. The regulations require leased access programmers to self-certify whether their work is "indecent" under this definition, at the risk of being barred from televising future work if they err in that judgment. *First Report and Order*, 8 F.C.C.R. 998, 1005 ¶ 43, 1007 ¶ 51, 1010 ¶ 75 (1993). That the regulations will likely result in overdeterrence by risk-averse programmers seeking to avoid the professional "death penalty" imposed for certification errors seems quite apparent. The result will inevitably be an extremely broad class of programming silenced by the regulations.

cinema-verite style. The 90's Channel has on occasion included segments on how to do a self-help gynecological exam, a documentary on the controversial Robert Mapplethorpe art exhibit, and a traditional fertility festival in Japan featuring a procession of marchers carrying images of human genitalia. Each of these programs included descriptions or depictions of sexual activities or organs that might well be considered "patently offensive" as measured by contemporary community standards. Self-applying the FCC's definition of "indecency," then, it is not at all improbable that a cable operator might declare all these programs "indecent," and find itself required under the regulations either to ban or to block them.

"Indecency" is not confined merely to material that borders on obscenity—"obscenity lite." Unlike obscenity, indecent material includes literarily, artistically, scientifically, and politically meritorious material. Indeed, by definition, it includes all "patently offensive" material that has any of these kinds of merit, and cannot be branded as obscene under the standard established by the Supreme Court in *Miller v. California*, 413 U.S. 15, 24 (1973). In many instances, the programming's very merit will be inseparable from its seminal "offensiveness." A bowdlerized documentary on the Mapplethorpe exhibit which did not include some description or depiction of Mapplethorpe's sexually explicit photographs themselves, for example, would hardly be an informative statement on the artistic and political debate the exhibit engendered. Yet the very act of including such powerful visual or audio images, which to many viewers are "patently offensive," would court an "indecency" citation by the FCC if the cable operator did not pull the plug or consign the program to a blocked channel. It is these kinds of portentous decisions about art, politics, science and "indecency" which are implicated in this case.

While we accept that the government may have a compelling interest in protecting children from indecent programming, we agree with Judge Edwards that that interest must be pursued in the context of helping parents to make viewing choices for their children as to the programming they watch

inside the home.[2] Additionally we note that producers of such programming also have a constitutional right against unnecessary governmentally-induced restrictions on their right to disseminate programs to willing adults. The legal issue devolves into one of whether the FCC's "indecency" regulations unduly burden the First Amendment rights of speakers and adult listeners on access channels of privately-owned cable systems. Before turning to this complicated question, however, we must satisfy ourselves that state action is present in Congress' statutory scheme.

I. State Action Is Involved in Sections 10(a) and (b)

The First Amendment commands that "Congress shall make no law ... abridging the freedom of speech...." Our state action analysis begins with the law that Congress has made in this case. Sections 10(a) and (b) of the 1992 Cable Act impose a disjunctive scheme regulating indecent speech. In tandem, they require that cable operators either ban or block "indecent" speech on leased access cable channels. The majority insists, however, that § 10(a) is exempt from constitutional scrutiny because it involves no state-imposed burden on speech. Instead, they say, § 10(a) merely restores to cable operators the "editorial control" taken away from them in the Cable Communications Policy Act of 1984, Pub. L. No. 98–549, 98 Stat. 2779 ("1984 Act"), which mandated the creation of publicly accessible leased channels and forbade operators from controlling the content of programs on those channels. Maj. op. at 15. In fact, § 10(a) does not restore any genuine editorial control to cable operators over indecent

[2] We note that the Supreme Court has never actually passed on the FCC's broad definition of "indecency." *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1338–39 (D.C. Cir. 1988) (acknowledging that in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court never specifically addressed whether the FCC's generic definition of indecency was unconstitutionally vague, but arguing that because the Court "implicitly" approved the definition by relying on it, lower courts are barred from addressing the vagueness issue on the merits).

material. Instead § 10 insists that a cable operator either ban a governmentally-defined category of "indecent" speech outright or, if it declines, relegate it to a separate channel and block *all* households from receiving that channel unless they specifically request it in writing up to 30 days in advance. Sections 10(a) and (b) are co-dependent parts of one statutory scheme regulating speech. They present cable operators with an "either-or" command: accentuate the positive by banning indecent leased access programming under § 10(a), or eliminate the negative by blocking it under § 10(b). There is no "Mr. In-between." The operator can no longer in close cases let the program air on a regular leased access channel, or televise it at a later hour when fewer children are watching, as he might on a regular commercial channel. Clearly, §§ 10(a) and (b) are inseparable parts of an integrated statutory regime that aims out front to curtail cable transmission of indecent speech, and affords cable operators only the most limited choice as to how to achieve that end.

The purpose and effect of §§ 10(a) and (b) are clear enough. As their chief congressional sponsor explained, they "*forbid* cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels." 138 CONG. REC. S646 (daily ed., Jan. 30, 1992) (statement of Sen. Helms) (emphasis added). That forthright statement would ordinarily end the state action inquiry. When Congress passes a statute whose avowed purpose, and effect, is to *forbid* or severely restrict communication of a certain category of speech defined by content, state action is usually conceded. *Cf., e.g., Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (congressional enactment may have differential effect on some categories of speech, so long as the statute is not "intended to suppress" a content-defined category of speech).

The majority argues, however, that because § 10(a) is couched in permissive language, not explicitly *requiring* the operator to ban indecent speech, there is no state action. Maj. op. at 12. But in effect, § 10 says "an operator *may* ban, or in the alternative *must* block." To illustrate the

effect of the "may" language of § 10(a) when used in the context of § 10(b), we point out that the operator's options—and the burden on speech—would be no different if the regulation were expressed in any of the following terms:

1. "an operator *must* ban, or in the alternative *must* block";

2. "an operator *may* block, or in the alternative *must* ban"; or

3. "an operator *may* ban, or in the alternative *may* block, but these alternatives are to the exclusion of all others."

All these formulations, linguistically distinct, are logically and functionally equivalent. Each *commands* that the cable operator *either* ban *or* block indecent speech. Yet the §§ 10(a) and (b) option is no different in its effect. Only empty formalism would elevate Congress' choice of the nominally permissive "may" language of § 10(a) to demonstrate the absence of state action, when § 10(b) lurks in the shadows, ready to pounce.[3]

Senator Helms's statements in floor debate that § 10 merely restores editorial control to cable operators do not do much to bolster the government's anti-state action argument. *See* 138 CONG. REC. S646 (daily ed., Jan. 30, 1992) (statement of Sen. Helms) ("this is not governmental action" but "action taken by a private party"); *id.* at S649 (statement of Sen. Helms) (in colloquy, responding affirmatively to the statement, "So this is not Government censorship"). In light of Sen. Helms's earlier statement that the purpose of § 10 was to "forbid" cable operators from transmitting indecent pro-

[3] Although the majority does not say so expressly, its analysis of § 10(b) as the "least restrictive means" for protecting children presumes that state action is implicated. Yet, if § 10(a) does not implicate state action, it is difficult to see why § 10(b) does either, since the cable operator is no more *required* to segregate-and-block indecent programming under § 10(b) than it is to ban indecent programming under § 10(a). In either case, the operator can avoid one provision entirely by "voluntarily" electing to submit to the *other* provision.

gramming, these later statements suggest only a belated awareness of the section's constitutional infirmities, and an attempt to put a gloss on the directive. But an unconstitutional sow's ear cannot be so easily converted into a constitutional silk purse.

The majority concedes that if the cable operator's decision to ban indecent programming under § 10(a) is state action, the regulation is a form of state censorship and cannot survive First Amendment scrutiny. Maj. op. at 11. But they go on to cite *Blum v. Yaretsky*, 457 U.S. 991 (1982), for the proposition that the cable operator's decision to ban indecent programming under § 10(a), however constrained, is *not* state action, but rather the action of a private party without a sufficiently close "nexus" to the government so that the state may be held responsible for his actions. Under *Blum*, the state can be held responsible for a private decision only if the state exercises coercive power on the private actor, provides "significant encouragement" for the decision, or transfers into private hands powers traditionally exercised by the state. *Id.* at 1004–05. Here, the majority contends, none of those criteria is met.

I do not think this case fits the *Blum* model. As *Blum* itself instructs, "[f]aithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." *Id.* at 1003. In *Blum*, nursing home patients challenged decisions by private physicians and nursing home administrators—based on "medical judgments . . . according to professional standards that are not established by the State," *id.* at 1008—to discharge or transfer them without procedural safeguards. The *Blum* complainants sought to hold those private decisionmakers to due process standards applicable to state actors; they did "not challeng[e] particular state regulations or procedures . . . ." on due process grounds. *Id.* at 1003. Here, in contrast, petitioners do not seek to apply First Amendment standards to the "actions taken by cable operators with respect to indecent programming," Maj. op. at 11. Instead, they mount a direct facial challenge to a federal statute and implementing regulations which have the avowed purpose and effect of

restricting communication of a content-defined class of constitutionally-protected speech. The majority's *Blum* analysis thus asks, and answers, the wrong question. The core question here is not whether the cable operators' private decisions implicate state action; whatever the answer to that question, we have state action in the government's own ban-or-block scheme, which is what is at issue here.[4]

As the Supreme Court explained in *Lugar v. Edmondson Oil Co., Inc.*—decided the same day as *Blum*—the point of the state action inquiry is to determine whether "the conduct allegedly causing the deprivation of a federal right ... [is] fairly attributable to the state." 457 U.S. 922, 937 (1982). To

[4] The confusion may stem from the way the argument was posed and addressed in the original panel opinion. There, the government conceded that if cable operators' decisions to ban indecent programming under §§ 10(a) and 10(c) *were* state action, the statute would impose a constitutionally impermissible censorship regime. *Alliance for Community Media v. FCC*, 10 F.3d 812, 820 n.9 (D.C. Cir. 1993), *vacated*, 15 F.3d 186 (1994). The panel held that cable operators' decisions were indeed state action. *Id.* at 818–22. The majority rejects that conclusion. But the majority's next move is a *nonsequitur*: it simply does not follow that, if the cable operators' decisions are *not* state action, then the statute itself is not state action, and is exempt from constitutional scrutiny. Indeed, it strikes me as a wholly untenable proposition that a statute duly enacted by the Congress of the United States could be anything other than state action.

The majority might better have argued that although the statute itself is plainly state action, it effects no abridgement of freedom of speech because it does nothing more than restore editorial control to cable operators. In that regard, they might have a stronger argument if the statute withdrew governmental restrictions on cable operators' control over leased and PEG access channels evenhandedly and across the board, without itself imposing differential regulations discriminating (as this statute does) on the basis of content in order to suppress a particular content-defined category of speech. *See infra*, Part IV.A. But instead of pursuing that line of reasoning, the majority would immunize the *statute itself* from constitutional scrutiny on grounds that cable operators' decisions under §§ 10(a) and 10(c) are not state action.